

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

GEORGE CUMMINS,

Petitioner,

v.

IOWA UTILITIES BOARD,

Respondent.

CASE NO. CVCV06

**RESPONDENT IOWA UTILITIES
BOARD'S MEMORANDUM BRIEF IN
SUPPORT OF MOTION TO DISMISS**

MEMORANDUM BRIEF

Mr. George Cummins' petition for judicial review seeks "immediate" review of the Iowa Utilities Board's (Board) July 28, 2023 order denying Cummins' motion to dismiss the pipeline company's petition filed in Board Docket No. HLP-2021-0001, *In re: Summit Carbon Solutions, LLC* (Summit Docket). Pursuant to Iowa Code chapter 479B, the company, Summit Carbon Solutions, LLC, (Summit) filed its January 28, 2022 petition with the Board for a hazardous liquid pipeline permit to construct, operate, and maintain approximately 687 miles of 6- to 24-inch diameter pipeline for the transportation of liquefied carbon dioxide within the state of Iowa.

Summit's proposed pipeline spans 29 counties and to date, the proceeding involves over 203 parties and over 1,000 landowners, and has had 3,056 comments and objections filed from others with over 7,342 documents filed in the docket. On June 16, 2023, the Board set a final procedural schedule, which included the start of the evidentiary hearing and issued a subsequent July 12 order setting the hearing to begin August 22, 2023, and continuing until completed.

In the Summit Docket, Cummins filed his motion to dismiss on June 21, 2023. Cummins claims the Board lacks subject matter jurisdiction over the Summit Docket

proceeding because the proposed pipeline allegedly will not transport “liquefied carbon dioxide” within the meaning of Iowa Code chapter 479B.

On July 28, 2023, the Board issued an order denying Cummins’ motion to dismiss. In its order, the Board determined that the transporting of carbon dioxide as proposed by Summit fell within the scope of Iowa Code chapter 479B, but *assuming arguendo* the proceeding did not fall within the scope of chapter 479B jurisdiction, then the Board’s jurisdiction fell within the scope of Iowa Code chapter 479. The Board stated,

Because either Iowa Code chapter 479B or 479 must apply and because there are no substantive differences between the procedures and standards applicable under the two chapters, the Motion to Dismiss can have no substantive effect on the rights of landowners or other impacted parties.

Board July 28, 2023 order at p. 12.

Iowa Code chapter 479B is titled “Hazardous Liquid Pipelines and Storage Facilities” and sets forth the Board’s regulatory function over hazardous liquid pipelines and the statutory requirements for pipeline companies owning, operating, or controlling those pipelines. The general assembly’s stated purpose of chapter 479B is to grant the Board authority

to implement certain controls over hazardous liquid pipelines to protect landowners and tenants from environmental or economic damages which may result from the construction, operation, or maintenance of a hazardous liquid pipeline or underground storage facility within the state, to approve the location and route of hazardous liquid pipelines, and to grant rights of eminent domain where necessary.

Iowa Code § 479B.1.¹ “*Hazardous liquid*” is defined in part as “liquefied carbon dioxide.” *Id.* § 479B.2(2).

Iowa Code chapter 479 is titled “Pipelines and Underground Gas Storage” and sets forth the Board’s regulatory function over the “transportation or transmission of any solid,

¹ All references are to Iowa Code (2021).

liquid, or gaseous substance, except water, within or through this state by pipeline” and the statutory requirements for pipeline companies owning, operating, or controlling those pipelines. The general assembly’s stated purpose of chapter 479 is

to confer upon the utilities board the power and authority to supervise the transportation or transmission of any solid, liquid, or gaseous substance, except water, within or through this state by pipeline, whether specifically mentioned in this chapter or not, and the power and authority to supervise the underground storage of gas, to protect the safety and welfare of the public in its use of public or private highways, grounds, waters, and streams of any kind in this state.

Id. § 479.1.

The Summit Docket evidentiary hearing began August 22, 2023, as scheduled with the hearing continuing weekly. It is after this hearing and the conclusion of all relevant procedural matters that the Board will issue its order determining whether to grant or deny Summit’s petition and issue the hazardous pipeline permit. In the absence of applications for rehearing or reconsideration, that Board order will be subject to judicial review as final agency action.

In the interim, Cummins filed his first petition for judicial review on August 11 seeking judicial review of the Board’s intermediate order denying his motion to dismiss. *See Cummins v. Iowa Utils. Bd.*, Polk Cnty. Dist. Ct., Case No. CVCV065913. The Board filed a motion to dismiss Cummins’ petition and asserted three jurisdictional grounds pursuant to Iowa Code section 17A.19: (1) Cummins is not “aggrieved or adversely affected” and lacks standing required by section 17A.19(1) as a result; (2) review of the final agency action is an adequate remedy and, as a result, Cummins fails to meet the section 17A.19(1) requirements for review of a preliminary, procedural or intermediate agency action; and (3) Cummins failed to serve all parties of the underlying contested case proceeding or mail copies of his petition to them and, as a result, failed to

comply with service requirements of section 17A.19(2). See *id.* §§ 17A.19(1) and (2). Thereafter, Cummins filed a voluntary dismissal of this first petition.

On September 12, Cummins filed a second petition for judicial review, again challenging the Board's July 28 order. He also filed a motion for stay. Cummins' petition does not state, let alone establish his injury or harm resulting from the agency action challenged. In his motion for stay, Cummins alleges

Irreparable Harm to Mr. Cummins

17. Forcing a party challenging a proceeding to expend time, effort and money to assert his rights when the agency has no jurisdiction to allow that proceeding, is inherently irreparable harm.

Cummins' motion at p. 9.

Pursuant to Iowa Code section 17A.19, Cummins' second petition for judicial review and motion fail to meet jurisdictional grounds: (1) Cummins is not "aggrieved or adversely affected" and, as a result, lacks standing required by section 17A.19; (2) review of the final agency action is an adequate remedy and, as a result, Cummins fails to meet the section 17A.19(1) requirements for review of a preliminary, procedural or intermediate agency action; and (3) Cummins failed to file his petition within 30 days after the issuance of the Board's order. See Iowa Code §§ 17A.19 (first unnumbered paragraph), 17A.19(2) and (3).

Compliance with the judicial review provisions of Iowa Code chapter 17A is the exclusive means by which a person may seek judicial review of agency action. *Id.* § 17A.19 (first unnumbered paragraph). In seeking judicial review, section 17A.19 provisions are jurisdictional and must be met. *Richards v. Iowa State Com. Comm'n*, 270 N.W.2d 616, 619 (Iowa 1978) (citation omitted).

Since review of agency action is purely statutory, the procedure prescribed by the statute must be followed in seeking the review especially those particulars which are jurisdictional or mandatory. A contrary rule would

inundate the courts with innumerable appeals, initiated without statutory foundation, and frequently of a petty or unmeritorious character. (internal citations omitted) (internal quotations omitted).

Id.

I. Cummins Fails to Meet Section 17A.19 Standing Requirements.

Cummins is not “aggrieved” or “adversely affected” within the meaning of Iowa Code section 17A.19 and lacks standing as a result. To have standing to challenge an administrative action, the complaining party must have a personal or legal issue and be adversely affected by the agency action.

The standing to sue means a complaining party must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected. *Alons v. Iowa Dist. Ct. for Woodbury Cnty.*, 698 N.W.2d 858, 864 (Iowa 2005); *City of Des Moines v. Pub. Emp’t Rel. Bd.*, 275 N.W.2d 753, 759 (Iowa 1979). The focus is on the party and not the claim. *Alons*, 698 N.W.2d at 864.

Cummins does not meet the requirement of being “injuriously affected.” In making this determination for the second requirement of standing, a quote from the *Alons* Court is instructive:

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not conjectural or hypothetical.” “Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly ... traceable to the challenged action of the defendant, and not ... the result of the independent action of some third party not before the court.’ Third, it must be ‘likely,’ as opposed to merely speculative,” that the injury will be “redressed by a favorable decision.”

Id. at 867-68 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351, 364 (1992)).

In this case, Cummins does not have a “concrete” or even “speculative” injury resulting from the Board’s alleged lack of jurisdiction pursuant to Iowa Code chapter

479B. Cummins' challenge to the Board's jurisdiction is a moot point. *Assuming arguendo* that the Board did not have jurisdiction over the Summit Docket proceeding pursuant to Iowa Code chapter 479B, then the Board has jurisdiction pursuant to Iowa Code chapter 479. As the Board indicated in its July 28 order, "there are no substantive differences between the procedures and standards applicable under the two chapters." See Iowa Code chapters 479 and 479B. Accordingly, the Board would proceed in the same manner for the Summit Docket pursuant to chapter 479 with no discernable effect on any party including Cummins. If Cummins' underlying argument were correct, the result is a retitling of the proceeding and nothing more.

Cummins is not "injured" if the Board does not have jurisdiction over the Summit Docket pursuant to Iowa Code chapter 479B, but proceeds in the same manner exercising jurisdiction pursuant to Iowa Code chapter 479. Therefore, Cummins is not "aggrieved" or "adversely affected" within the meaning of Iowa Code section 17A.19. Cummins lacks standing as a result and his petition for judicial review should be dismissed.

II. Cummins Fails to Meet Section 17A.19(1) Requirements for Judicial Review of a Preliminary, Procedural, or Intermediate Agency Action.

Cummins' petition for judicial review is not immediately reviewable because review of the final agency action, the Board's final order on Summit's petition, would provide an adequate remedy. Pursuant to Iowa Code section 17A.19(1),

[a] preliminary, procedural, or intermediate agency action is immediately reviewable if all adequate administrative remedies have been exhausted and review of the final agency action would not provide an adequate remedy.

Additionally, the petitioner must show delaying judicial review until after the agency proceeding is inadequate. *Salsbury Labs. v. Iowa Dep't of Env't Quality*, 276 N.W.2d 830, 836 (Iowa 1979).

In the present case, Cummins fails to meet the requirements for the Court's review of the Board's intermediate July 28 order. First, Cummins failed to exhaust all administrative remedies. An adequate administrative remedy exists when the Board can proceed with the Summit Docket proceeding pursuant to Iowa Code chapter 479.

Second, assuming this is an inadequate remedy, the Board's final order is subject to judicial review and provides an adequate remedy for Cummins to raise his claim. Cummins must exhaust an inadequate remedy if judicial review from the final agency action is adequate. *See id.* at 837. Cummins has not pleaded in his petition for judicial review, let alone established as required, that delaying judicial review until after the agency proceeding is an inadequate remedy. Nowhere in the petition does it state or imply how Cummins seeking judicial review of the final judicial review would be inadequate as is required for a petitioner seeking intermediate judicial review.

In Cummins' motion for stay, he does plead "Irreparable Harm" for his expenditure of "time, effort and money to assert his rights." Assuming the facts of the pleading as true, Cummins' expenditure of those resources do not warrant intermediate review by the Court. *See id.*

Under most circumstances, monetary losses caused by litigation expenses or deprivation of earnings are insufficient to be considered irreparable injury. Loss of or damage to reputation is not ordinarily severe enough to be considered irreparable.

Id. (citation omitted). Monetary losses caused by litigation expenses ordinarily are insufficient to justify intermediate judicial review. *Iowa Indus. Com'r v. Davis*, 286 N.W.2d

658, 662 (Iowa 1979). Thus, judicial review of the final agency action provides an adequate remedy regardless of Cummins' expenditure of time, effort and money.

Further, the Iowa Supreme Court found judicial review of final agency action to be an adequate remedy under similar facts. The case involved property owners who challenged the sufficiency of the utility's notice and the commission's jurisdiction in a franchise petition proceeding. See *Richards*, 270 N.W.2d 616. After the Commission denied the property owners' motion to dismiss, the property owners sought judicial review of the Commission's intermediate agency action pursuant to Iowa Code section 17A.19(1). See *id.* at 619. The Court rejected the property owners' argument that review of the final agency action would be inadequate because construction of the line would be completed if the Commission granted the franchise. *Id.* at 620. While the property owners were theoretically correct that construction was possible even when judicial review is sought, the Court pointed out that the legislature has specifically provided for district court stay of agency action in appropriate cases to prevent unfairness. *Id.*

A party seeking immediate review must show the existence of fact specific reasons why judicial review of final agency action is inadequate. See *id.* "[A] remedy is adequate if it is 'clear, complete, and as practical and efficient to the ends of justice and its proper administration as a remedy in equity.'" *Id.* (citation omitted). The "adequacy of a remedy" is measured "by whether the statutory remedy provides an avenue for review of the administrative determination by which the party was aggrieved." *Id.* at 621 (citation omitted). In *Richards*, the Court found delay of judicial review provided an adequate remedy when the issues raised were preserved and could be heard; the same standing requirements applied; the same relief was available; the same standard of review applied;

and final review provided a more complete remedy when all issues regarding the franchise had been determined. *Id.*

The Court rejected the property owners' contention that an exception applies to the statutory prerequisite when jurisdiction of the agency is challenged. *Id.* The exhaustion of administrative remedies applies just as forcibly when the contention is made that the agency lacked jurisdiction over the subject matter. *See id.* at 622. The Court did not decide whether exceptions existed, but examined cases where very limited exceptions may apply only when jurisdiction is a question of law and not based on disputed facts and the plaintiff is faced with actual or imminent peril of sustaining irreparable harm that is, real and serious injury if the pending administrative proceeding is continued to its final completion. *See id.* at 622-24.

Cummins has not pleaded, let alone established, in his petition for judicial review that delaying judicial review until after final agency action is an inadequate remedy. Assuming factual allegations as true in his motion for stay, his expenditure of time, effort and money do not constitute irreparable harm to warrant a stay or intermediate review. The issues raised by Cummins are preserved and can be heard at the later time; the same standing requirements will apply; the same relief is available; the same standard of review will apply; and final review will provide a more complete remedy when all issues regarding the pipeline have been determined. Because review of final agency action will provide an adequate remedy, Cummins fails to meet section 17A.19(1) requirements for intermediate judicial review and his petition must be dismissed as a result.

III. Cummins Failed to File His Petition within 30 days of the Board's Order.

Cummins filed this petition on September 12—46 days following the Board's July 28 order. It is undisputed that the underlying Summit Docket is a contested case

proceeding. The Board asserts Cummins' filing is subject to the 30-day requirement of section 17A.19(3) and is therefore untimely.

Pursuant to Iowa Code section 17A.19(3) and relevant to this case,

a petition must be filed within thirty days after the issuance of the agency's final decision in a contested case. . . . In cases involving a petition for judicial review of agency action other than the decision in a contested case, the petition must be filed at any time petitioner is aggrieved or adversely affected by that action.

See Iowa Code §17A.19(3).

Where the petitioner, such as Cummins here, is seeking "immediate" judicial review of a preliminary, procedural, or intermediate agency action, the 30-day deadline should be applicable. In the most recent case on point, the Court left it open whether the 30-day deadline applies to judicial review from agency interlocutory actions. See *City Of Des Moines v. City Dev. Bd. of State*, 633 N.W.2d 305, 311 (Iowa 2001). Any other deadline is inconsistent with an "immediate" review required rather than waiting for final agency action. Appellate deadlines, such as the thirty-day deadline are short by design due to the need for finality. See *Askvig v. Snap-On Logistics Co.*, 967 N.W.2d 558, 562 (Iowa 2021).

In this case, Cummins filed his second petition and motion for stay 46 days following the Board's July 28 order. Cummins requests "immediate" review rather than waiting for final agency action. Because Cummins filed his petition more than 30 days from the order, his petition should be dismissed.

IV. CONCLUSION.

For all these reasons, judicial review of Cummins' petition is not proper when Cummins is not "aggrieved" or "adversely affected;" judicial review from the final agency action provides an adequate remedy for his claim; and Cummins failed to file his petition within 30 days of the Board order at issue. All of these circumstances, alone or in

combination, are grounds for finding that the Petitioner Cummins has not met section 17A.19 jurisdictional prerequisites and that his petition must thus be dismissed.

The Board prays that the Court find Petitioner George Cummins lacks standing; Cummins has failed to meet the requirements for intermediate review of an agency order; and Cummins failed to timely file his petition for judicial review. The Board prays that the Court set this matter for hearing and thereafter dismiss the Cummins' petition due to its failure to comply with the jurisdictional requirements of Iowa Code section 17A.19.

Respectfully submitted,

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